RMW 530

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

FILED
NOV - 1 2007
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Name Patterson, Jody D.
(Last) (First) (Initial)

Prisoner Number E-88649 ~~E-888649~~

Institutional Address Correctional Training Facility
P.O.Box 689, GW-252-L
Soledad, CA. 93960-0689

E-filing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Jody D. Patterson
(Enter the full name of plaintiff in this action.)

vs.

Ben Curry, Warden (A), et al.

(Enter the full name of respondent(s) or jailor in this action)

CV 07 5579 RMW

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

With Memorandum of Points Attached hereto in Support Thereof.

(Evidentiary Hearing Requested)

(PR)

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

ORIGINAL

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Orange County Superior Court, Santa Ana, California

Court Location

(b) Case number, if known C-79650

(c) Date and terms of sentence March 8, 1991; 7 years to life

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes XX No ____

Where?

Name of Institution: Correctional Training Facility

Address: P.O. Box 686, Soledad, CA. 93960-0686

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Attempted Murder; Penal Code Section 664/187

3. Did you have any of the following?

Arraignment: Yes X No ____

Preliminary Hearing: Yes X No ____

Motion to Suppress: (UNKNOWN) Yes ____ No ____

4. How did you plead?

Guilty ____ Not Guilty XX Nolo Contendere ____

Any other plea (specify) ____

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone ____ Judge alone on a transcript ____

6. Did you testify at your trial? Yes XX No ____

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes X No ____

(b) Preliminary hearing Yes X No ____

(c) Time of plea Yes X No ____

(d) Trial Yes X No ____

(e) Sentencing Yes X No ____

(f) Appeal Yes X No ____

(g) Other post-conviction proceeding Yes X No ____

8. Did you appeal your conviction? Yes X No ____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes X No ____

Year: 1991 Result: Affirmed

Supreme Court of California Yes X No ____

Year: 1991 Result: Affirmed

Any other court Yes ____ No XX

Year: ____ Result: ____

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes ____ No XX

(c) Was there an opinion? UNKNOWN Yes ____ No____

(d) Did you seek permission to file a late appeal under Rule 31(a)?

(Not Applicable Here.) Yes ____ No XX

If you did, give the name of the court and the result:

This petition raises claims resulting from a parole consideration hearing only.

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this ~~conviction~~ Parole hearing in any court, state or federal? Yes XX No____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).] (All state remedies have been exhausted).

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Orange County Superior Court

Type of Proceeding: Habeas Corpus Petition

Grounds raised (Be brief but specific):

a. Same as raised herein.

b. Case # M-11219

c. (See Exhibit "I")

d.

Result: Denied Date of Result: 3-22-07

II. Name of Court: Fourth District Court of Appeal, Div. 3

Type of Proceeding: Habeas Corpus Petition

Grounds raised (Be brief but specific):

a. Same as raised herein

b. Case # G038678

c. (See Exhibit "J")

d.

Result: Denied Date of Result: 6-7-07

III. Name of Court: Supreme Court of California

Type of Proceeding: Petition for review

Grounds raised (Be brief but specific):

a. Same as raised herein

b. Case # S153530

c. (See Exhibit "K")

d.

Result: Denied Date of Result: 8-8-07

IV. Name of Court: None

Type of Proceeding:

Grounds raised (Be brief but specific):

a.

b.

c.

d.

Result: Date of Result:

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes ____ No XX

Name and location of court: Not Applicable

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: See attached pages

Supporting Facts: See attached pages

Claim Two: See attached pages

Supporting Facts:

Claim Three: See attached pages

Supporting Facts:

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

All grounds stated herein have been exhausted through all state levels. (See Exhibits "I", "J", "K".)

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CLAIMS FOR RELIEF:

INTRODUCTION

COMES NOW, Jody D. Patterson (hereafter "Petitioner"), with his federal Petition for Writ of Habeas Corpus, 28 U.S.C. 2254, challenging the California Board of Parole Hearings (hereafter Board/BPH) finding him unsuitable for parole for the seventh time on immutable factors and reasons that do not provide "some evidence" to support the statutory exception that Petitioner's release to the strict supervision of parole would unreasonably endanger public safety.

CLAIM 1.

THE BOARD OF PAROLE HEARINGS' DECISION TO DENY PAROLE IS SUBJECT TO MEANINGFUL JUDICIAL REVIEW.

Petitioner was convicted on January 28, 1991 by jury trial of Attempted Murder of Matt Mabry in the Superior Court of Orange County and sentenced to a term of life with the possibility of parole on March 8, 1991 (See Abstract of Judgement attached hereto as Exhibit "A"). The Court ordered commitment to state prison and ordered 560 days of pre-prison credit to be applied (Exhibit "A"). Petitioner was received by the California Department of Corrections and Rehabilitation (hereafter CDCR) on March 14, 1991. CDCR computed the start of Petitioner's life sentence at March 14, 1991 and set his minimum earliest parole date (hereafter M.E.P.D.) at August 26, 1996. Petitioner has been incarcerated continuously since his arrest for the commitment offense on February 28, 1990. Therefore, the determinant term under P.C. §664/187 is long since exhausted.

Petitioner had his Initial Parole Consideration Hearing on October 17, 1995, with subsequent hearings in 1997, 1998, 2001, 2003, 2004, and the hearing being addressed within this petition was held on August 2, 2006.

Petitioner claims herein that the 2006 hearing panel denied a parole release date without benefit of due process. In such a case, petition for writ

of habeas corpus in the state and federal courts is the proper recourse. Petitioner has a liberty interest in a parole release date under the state and federal constitutions. The decision to deprive petitioner of this liberty interest is due meaningful judicial scrutiny to assure that the August 2, 2006 BPH decision comports with due process of law.

CLAIM 2.

THE BOARD OF PAROLE HEARINGS VIOLATED PETITIONER'S FEDERALLY PROTECTED RIGHT TO DUE PROCESS, GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT FOUND PETITIONER UNSUITABLE FOR PAROLE FOR THE SEVENTH TIME, RELYING ON IMMUTABLE FACTORS AND REASONS THAT DO NOT PROVIDE "SOME EVIDENCE" TO SUPPORT THE "CONCLUSION" THAT PETITIONER "WOULD POSE AN UNREASONABLE RISK OF DANGER TO SOCIETY OR A THREAT TO PUBLIC SAFETY IF RELEASED FROM PRISON."

There are 15 (fifteen) regulatory factors which the BPH is required to consider prior to rendering a decision regarding a prisoner's parole suitability and , therefore, **current** risk assessment and they are given in the California Code Of Regulations, Title 15 (hereafter CCR 15), §2402 (c) & (d). Of the 6 (six) unsuitability factors listed in CCR 15 §2402 (c), the BPH had sufficient evidence for only 1 (one): CCR 15, §2402(c)(1), commitment offense. By the reasoning and evidence reflected in the decision, the BPH's sole factor for denying parole was the commitment offense because the evidence for the 2 (two) other unsuitability factors (the motive was trivial, and disciplinary history) used by the BPH, was insufficient as a matter of fact and law (see Exhibit "B", 2006 BPH hearing transcripts (hereafter HT:2006), pg. 75, lns. 13-26; pg. 76, lns. 1-9).

The BPH panel made very positive comments regarding petitioner's prison program (HT:2006, pg. 76, lns. 21-26; pg. 77, lns. 1-13 & 24-26), but expressed concern over petitioner's "serious disciplinary violations in prison." (HT: 2006, pg. 77, lns. 14-24), yet concluded that petitioner has a reasonable record (HT:2006, pg. 77, lns. 22-23).

To the issue of petitioner's "reasonable [disciplinary] record", this record consists of 3 (three) CDC 115's which are as follows: 1). 1992 for gambling for push-ups; 2). 2002 for refusing to work; and 3). 2004 for disobeying orders which was reduced to an administrative 115 (a blue 128-A). CCR 15 §2402 (c)(6) has been interpreted to mean violence in prison, not the type of administrative discipline or non-violent rule infractions mentioned by the panel. Therefore, the BPH's evidentiary basis seems more relevant to CCR 15 §2402 (d)(9) than any other factor, which indicates petitioner's lack of serious prison misconduct tends to show his suitability, not unsuitability as the BPH panel at petitioner's August 2, 2006 hearing did not explicitly reflect a decision finding true CCR 15 §2402 (c)(6).

In contrast, the BPH panel generally found true many of the applicable suitability factors under CCR 15 §2402 (d). For example: the BPH stated, "You have presented to this board viable residential plans, as well as, plans for your transition into society... and in the marketable skills you have. And you certainly have extensive, extended family support." This falls under CCR 15 §2402 (d)(8) parole plans or marketable skills, both of which the panel found the record to support.

It is apparent from the hearing transcripts that the BPH's many positive comments can be tethered to a number of other regulatory factors reflected by decision. CCR 15 §2402 (d)(1) & (6): no record of assaultive behavior as a juvenile; lack of criminal history (HT:2006, pg. 76, lns. 17-18; see also Exhibit "C", 2006 board report, pg. 2; and Exhibit "E", 2003 mental Health evaluation, pg. 6). §2402 (d)(2) stable social history. The panel did not find to the contrary (HT:2006, pg. 78, lns. 6-7). §2402 (d)(8) understanding and plans for the future (HT:2006, pg. 78, lns 2-7). §2402 (d)(9) Instititional behavior (HT:2006, pg. 76, lns. 21-26; pg. 77, lns. 1-13; pg. 78, lns. 15-22). However, contrary to their required duty, the BPH's decision failed to reflect

as is required by law, consideration of 2 (two) crucial factors in their assessment of petitioner's **current** risk to public safety. First is CCR 15 §2402 (d)(3) signs of remorse and, second,CCR 15 §2402(d)(7) age.

As to remorse: despite the historical and regulatory significance of this factor, as it relates to current assessments, the 2006 panel did not even mention remorse nor question petitioner on this factor; Petitioner's counsel had to do this for them (HT:2006, pg. 55, lns. 11-25). The board and psych reports (Exhibits "C","D","E", and "F"), letters from the public, prior BPH decisions, all speak of petitioner's remorse.

Similarly, the 2006 panel's decision reflects no consideration of the import of maturity and age in its assessment of petitioner's **current** risk to public safety. The regulation CCR 15 §2402 (d)(7) speaks to a prisoner's age, that it "reduces the probability of recidivism." The importance of considering this factor is underscored because, as shown later, the probative value of petitioner's offense as a predictor of his **current** dangerousness is diminished by his age at the time of the offense and his current maturity. Petitioner was 26 at the time of the offense. Given petitioner's relatively young age, made even younger by drug and alcohol use at the time of the offense, and the focus the governing regulations in general give to the repair and reformation of character difficiencies of the young offender, and the fact that petitioner is now 43 years old and drug and alcohol free for nearly 17 years, it seems very unfair that the BPH panel's decision did not reflect any consideration of this factor.

It cannot, therefore, be said that the BPH has fairly given individualized consideration to all statutory and regulatory factors in its assessment of Petitioner's **current** dangerousness and risk to public safety. By relying solely on the commitment offense for the 7th (seventh) time to deny petitioner his federally protected liberty interest in a parole date, the BPH's failure

to reflect consideration of many suitability factors to mitigate the **current** risk to public safety represented by the offense is a violation of due process as is protected under the United States and California constitutions.

CLAIM 3.

PETITIONER'S COMMITMENT OFFENSE WAS NOT A FIRST DEGREE MURDER; A FELONY MURDER; NOR AN EXECUTION STYLE MURDER, YET PETITIONER HAS SERVED THE MINIMUM TERM FOR SUCH OFFENSES.

The hearing transcripts themselves, on page 1, make clear the evaluation of the gravity of petitioner's offense was to be based upon Attempted Murder (HT:2006, pg. 1; see also Exhibit "A" -Abstract of Judgement). Yet, the BPH panel held that petitioner was an unreasonable risk to public safety (HT:2006, pg. 75, lns. 11-13), meaning that they made a determination of the gravity of petitioner's offense under Penal Code §3041(b) while the facts of the attempted murder may justify an initial refusal to grant parole, it has become questionable under a first degree murder standard.

Petitioner became eligible for parole under PC. §190 et seq. on August 26, 1996 under a sentence of life with the possibility of parole in 7 years. Petitioner has had 7 (seven) parole hearings. Had petitioner been convicted of First Degree Murder, instead of attempted murder, he would have become eligible for parole in August of 2006. Given that initial parole hearings are held 13 months before the MEPD, petitioner's August 2, 2006 hearing is very close to what would have been his initial hearing had he been convicted of First Degree Murder.

The BPH panel held Petitioner's offense to be especially cruel and callous and compared it to an execution style murder. Under CCR 15, §2402 (c)(1), especially heinous manner and circumstances may be used to determine that the gravity of the offense (PC. §3041 (b)) is such that its implications for public safety require a more lengthy period of incarceration. It's another matter entirely and questionably whether the callousness and motivation for the

offense were as grave a threat to public safety as one who actually murdered someone or committed a felony murder. Petitioner should have had the gravity of his actual offense and his current risk to public safety evaluated and considered in light of first degree murder standards now that he has met eligibility for parole under first degree murder.

Petitioner's offense is not felony murder and noone, not even the District Attorney or the sentencing judge, has ever alleged that any special circumstances or any PC. §189 felony occurred during the commission of Petitioner's offense. Therefore, petitioner's offense should have been considered in light of all first degree murders to see if it warranted a more lengthy sentence than they. The BPH has and does find first degree murderers suitable for parole. They also find second degree murderers suitable for parole, with less time served than petitioner in some cases. In light of these facts, and considering no murder was committed in petitioner's offense, petitioner should have been found suitable for parole, or, in the least, his offense, held up against other -more heinous crimes of murder, should no longer stand as a justifyable reason to deny parole or be used to justify a finding of unreasonable risk.

Based on the aforementioned, requiring petitioner to serve out a term comparable to a 25 to life sentence, yet not comparing petitioner's offense to other first degree murderers, is a serious violation of due process and is vindictive. Petitioner did not murder his victim yet the BPH is treating him as if he did and should be incarcerated as if he did.

CLAIM 4.

PETITIONER CONTENDS THERE IS NO EVIDENCE IN THE RECORD TO PERMIT HIS "SERIOUS" RULES VIOLATION REPORTS (CDC-115's) TO BE "SOME EVIDENCE" WITHIN THE MEANING OF **SUPERINTENDENT v HILL** AS AN INDICIA OF RELIABILITY TO PREDICT FUTURE DANGEROUSNESS OR TO BE AN UNREASONABLE RISK UNDER CCR15, §2402 (a).

CCR 15, §2402 (a) states: "General, the panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length

of time served a life prisoner shall be found unsuitable for and denied parole if in the judgement of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Therefore, the BPH's rationale must reasonably relate to an unreasonable risk of danger as supported by cognizable evidence. However, the procedure doesn't stop here. CCR 15, §2402 (c) states: "Circumstances tending to show unsuitability, (6) Institutional behavior The prisoner has engaged in serious misconduct in prison or jail."

Reciprocal and counter to the BPH's use of prison misbehavior, a lack of serious misconduct indicates an enhanced ability to function within the law upon release. As discussed in Claim 2 of this petition, CCR 15, §2402 (c)(6) has been interpreted to mean violence in prison. The BPH panel at petitioner's August 2, 2006 hearing was aware that none of petitioner's disciplinary reports were for violence or for drug or alcohol use as they had CDCR generated board and psychological reports that detailed petitioner's disciplinary history, as well as, petitioner's central file. In contrast to the panel's claims, Dr. J. Steward, Psy.D. stated:

> "This is his [Petitioner] first incarceration and he has not received any significant disciplinaries in the past 11 years. Further, none of the disciplinaries have been of a violent nature." (Exhibit "E", pg. 6, ¶ A)

Dr. Joe Reed, Ph.D. concurred, stating basically the same thing in his report (Exhibit "F", pg. 5, part A, ¶ 3). Further, the primary report prepared by staff psychologist Lance Portnoff, Ph.D. (primary, in that, it was prepared specifically for the August 2, 2006 hearing), Dr. Portnoff stated:

> "...this inmate's violence potential is nil. In the 16 years since the commitment offense, he has not demonstrated any aggressive behavior as evidenced in his central file disciplinary section." (Exhibit "D", pg. 3)

Dr. Portnoff further stated:

> "Based upon his lack of prior aggressive offenses and lack

> of subsequent aggressive behavior, it seems clear that the commitment offense was not the product of an habitually aggressive criminally oriented individual, but rather an aberration secondary to substance abuse and substance-induced mental disorder." (Exhibit "D", pg. 4, ¶ 1)

In Superintendent v Hill, it was stated: "We hold that the requirements of due process are satisfied if some evidence supports the decision." This "some evidence" test necessitates the Board showing/establishing how petitioner's non-violent disciplinaries is evidence to deduce/support an unreasonable risk to society if released. These so-called "serious" CDC-115's being used to deny parole are not a felony or misdemeanor infractions amounting to a public crime.

Based on the aforementioned and the fact that 3 (three) prison psychologists all concur that petitioner's 3 (three) disciplinaries were not violent or significant and that petitioner's violence potential is "nil" or "no more than the average citizen," the BPH's use of petitioner's disciplinary history as some evidence should not be found to have merit and should be rejected. The BPH panel stated that petitioner's disciplinary record was "a reasonable record" (Exhibit "B", HT:2006, pg. 77, lns. 22-23). The panel determined that a "reasonable [disciplinary] record" posed an unreasonable threat to public safety. This meets the criteria for capricious and arbitrary, and violates petitioner's right to a fair hearing and his right to due process and his protected liberty interest in parole.

In the superior court's denial the judge linked petitioner's disciplinary history with his crime. This was a finding by a previous panel and not the finding at the August 2, 2006 hearing in question. Petitioner received a CDC-115 in 2002 for refusing to work. Petitioner only received this write-up after several attempts to be reassigned to a job that permitted him to obtain adequate sleep as the assignment that he currently held required him to work all night long afterwhich he would have to attempt to sleep in a building

that was extremely noisy. Petitioner's attempt to rectify the issue was met with resistance and petitioner made the decision to quit the job assignment. Petitioner did not then attempt to kill his supervisor as was the case in 1990.

CLAIM 5.

THERE IS NO NEXUS BETWEEN THE COMMITMENT OFFENSE, "A REASONABLE [DISCIPLINARY] RECORD," AND PETITIONER'S CURRENT PAROLE RISK.

There must be some basis in fact for the BPH to conclude in 2006 that an admittedly serious crime in February of 1990 is probative of petitioner's unreasonable risk to public safety. However, there is no rational argument or any evidence cited in the BPH's decision to connect the 1990 offense with any specific threat to public safety or to demonstrate any specific risk to public safety.

All the information received from the CDCR by the BPH is supportive of petitioner's release. The only opposition to release came from the victim and the Deputy District Attorney and these will most likely always be in opposition. The psychological report prepared for the hearing is supportive of release. In fact, all 3 (three) of the psych. reports attached to this petition (Exhibits "D", "E", and "F") are supportive of release. The counselor prepared board reports are also supportive of release. Based on the fact the experts hired by the CDCR and the BPH found petitioner posed no more of a threat to public safety than the average citizen and the fact the counselors did not refute those claims, the attempt at a nexus by the BPH does not stand.

Concomittant with this conclusionary stance, The BPH identified not one circumstance of the crime which currently existed and was operating to create the probability of petitioner being a current risk to public safety. The BPH did not identify any post-conviction circumstance or regulatory factor currently existed and was operating to create the probability of petitioner being a risk to public safety.

The BPH did not establish by any evidence or argument in what manner the circumstances of the crime would require a particular rehabilitation goal to be reached. Under this state of affairs, none of petitioner's rehabilitation is relevant to suitability; no rehabilitation could theoretically make petitioner less of a risk to public safety. Other than a change in personality on some future panel who arbitrarily and capriciously decides petitioner's gains are now handled, petitioner will immutably be as much a threat on the day he dies, years in the future, as he was on February 28, 1990. The BPH's decision makes a mockery of the rehabilitative goals of the parole system.

The BPH has failed to give petitioner's rehabilitation individualized consideration in the context of the parole system's goal of rehabilitation and return to society. Therefore, petitioner has been unfairly denied his liberty interest in parole.

PRAYER FOR RELIEF.

WHEREFORE, Petitioner respectfully requests that the petition for writ of habeas corpus be granted, and that he be ordered released from custody forthwith as remand to the BPH for reconsideration and subsequent review by the Governor would be an act in futility **(See Martin v Marshall (I)**, 431 F.Supp. 2d 1038, 1046-1048 (N.D. Cal. 2006)**)**. ["The no-parole policy for murders was initiated by Governor Wilson and continued under Governor Davis."]; See also the subsequent "MEMORANDUM & ORDER Re: Request for modification of judgement," **Martin v Marshall (II)**, 448 F.Supp. 2d 1143, 1144-1145 (N.D. Cal. 2006) ["In sum, the Board appears to have capitulated to the blanket no-parole policy described by this coutt in its previous order, abandoning its role as an independent assessor of petitioner's [parole] eligibility"].) Or, in the alternative, an evidentiary hearing be ordered and counsel appointed.

Date: 10-25-07,

Respectfully Submitted,

Jody Patterson

Jody D. Patterson,

MEMORANDUM OF POINTS AND AUTHORITIES

A.

STANDARD OF REVIEW.

A district court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. §2254 (d).

The United States Supreme Court has explained that section "2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning." (**Bell v Cone**, 535 U.S. 685, 694, 122 S.Ct. 1842 (2002).) Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. (**Williams v Taylor**, 519 U.S. 362, 412-413 (2000); See **Lockyer v Andrade**, 538 U.S. 63 (2003).) Section 2254 (d) applies to a habeas petition from a state prisoner challenging the dnial of parole. (See, **Sass v California Board of Prison Terms**, 461 F.3d 1123, 1126-1127 (9th Cir. 2006).)

While only Supreme Court precedent is controlling under the AEDPA, other case law is persuasive authority "for purpose of determining whether a particular state court decision is an unreasonable application of Supreme Court

law." (**Viasak v Superior court of California ex reel. County of Los Angeles**, 329 F.3d 683, 687 (9th Cir. 2003) (quoting **Luna v Cambra**, 306 F.3d 954, 960 (9th Cir. 2002) (internal quotation marks and citation omitted), **Amended**, 311 F.3d 928 (9th Cir. 2002)); See **Bruce v Terhune** 376 F.3d 950, 956 (9th Cir. 2004) ["Although only the Supreme Court's precedents are binding on state courts under AEDPA, our precedents may provide guidance as we review state-court determinations."].) The requirement for federal precedent is not limited to a precise ruling on similar facts, rather, it is enough that the United States Supreme Court has established the Constitutional principle or frame-work for the issue that would reasonably apply to exigent facts and claims. (**Williams v Taylor**, 519 U.S. at 408-409; **Van Tran v Lindsey**, 212 F.3d 1143,1154 (9th Cir. 2000).) As the Ninth Circuit Court recently noted, it is sufficient if the Supreme Court "has... set forth a working Constitutional standard by which to evaluate" the petitioner's claim. (**Fisher v Roe**, 263 F.3d 905, 915 (9th Cir. 2001).) There is no question that the Supreme Court has done that in **Greenholtz, ante**, and **Allen, ante**, in establishing the framework for deter-mining liberty interests, but also in **Edwards v Balisok**, 520 U.S. 641, 657 (1982) (explaining the "some evidence" standard and cautioning that it is a standard of judicial review only and does not act as a substitute for other due process requirements) (emphasis added); or **Douglas v California**, 372 U.S. 353, 358 (1963) ("meaningless rituals" violate due process); or **Schweiker v McClure**, 456 U.S. 188, 195 (1982) (right to fair and impartial decision-maker); or other similar cases.

Where, as in petitioner's case here (Exhibit "K"), a high state court has denied a claim without explanination, federal courts "look through" that denial to the last reasoned state decision. (Exhibit "I"). (**See Ylst v Nunnemaker**, 501, 797, 803-806 (1991); **Shackleford v Hubbard**, 234 F.3d 1072, n. 2 (9th Cir. 2000), cert. Denied, 534 U.S. 944 (2001).)

B.

THE STATE COURT'S DENIAL OF PETITIONER'S HABEAS CORPUS CLAIMS SHOULD NOT BE GIVEN AEDPA DEFERENCE BECAUSE IT WAS DERIVED FROM A MISAPPLICATION OF THE "SOME EVIDENCE" STANDARD, AND WAS BASED ON AN UNREASONABLE INTERPRETATION OF INFORMATION NOT VETTED THROUGH FORMAL BRIEFING OR AN EVIDENTIARY HEARING.

Petitioner filed a Petition for Writ of Habeas Corpus with the Orange County Superior Court on February 20, 2007. The petition was denied on March 22, 2007 without formal briefing or an evidentiary hearing. (Exhibit "I"). The State Court of Appeal and the California Supreme Court summarily denied petitioner's petitions. (Exhibits "J, K"). The state courts, therefore, have not properly adjudicated petitioner's claims that no evidence, with an indicia of reliability, or rational nexus to the Board's conclusions, supported the Board's conclusions that petitioner's release would currently pose an unreasonable endangerment to public safety. (**Superintendent v Hill**, 472, U.S. 445, 454-455 (1985).) Petitioner submits that an evidentiary hearing is necessary.

A petitioner on federal habeas corpus is entitled to an evidentiary hearing where the petitioner establishes a "colorable" claim for relief, and where the petitioner has never been accorded a state or federal hearing on his claims. (**Earp v Oronski**, 431 F.3d 1158, 1167 (9th Cir. 2005), citing **Townsend v Sain**, 372 U.S. 293 (1963) and **Keeney v Tamayo-reyes**, 504 U.S. 1, 5 (1992).) In stating a "colorable" claim, a petitioner is merely required to allege specific facts which, if true, would entitle him to relief. (**Ibid.**) Granted, under the AEDPA, a federal court is not required to order a hearing where the petitioner failed to develope the facts in state court. In such cases, the federal court accords a presumption of correctness to the facts found by the state court, and need not hold an evidentiary hearing unless those facts are rebutted by clear and convincing evidence. On the other hand, No AEDPA deference is due where the state has made an "unreasonable" determination of the facts; and: "[w]here a state court makes evidentiary findings without holding a hearing

and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts." (**Taylor v Maddox**, 336 F.3d 992, 1001 (9th Cir. 2004).)

In sum, an evidentiary hearing is required under the AEDPA "where the petitioner establishes a colorable claim for relief and has never been accorded a state or federal hearing on his claim." (**Earp v Oronski**, 431 F.3d, at 1167)

The state courts failed to hold an evidentiary hearing on state habeas corpus. Therefore, the courts did not determine the decisive and operative "facts" upon which a denial of petitioner's constitutional claims could legitimately be based. This failure was not due to any fault of petitioner, who was not even accorded a formal "Order To Show Cause" (Cal. Rules of Court, rule 4.551 et Seq.) at any level of state exhaustion of remedies (Exhibits I,J,K), even though petitioner requested such in the prayer for relief of each petition.

To the limited extent the state courts did determine the operative "facts" regarding petitioner's habeas corpus claims, those facts were based upon unreasonable determinations of exhibits presented and are contradicted by clear and convincing, contradictory evidence submitted in the petition herein. Petitioner is, therefore, entitled to an evidentiary hearing in this court before this court can make any credibility determination on the facts alleged in the petition and supporting exhibits.

C.

PETITIONER HAS A LIBERTY INTEREST IN RELEASE ONTO PAROLE PROTECTED BY THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., Amend. XIV, §1.) In **Greenholtz v Inmates of the Nebraska Penal and Correctional Complex**, 442 U.S. 1 (1979), the Supreme Court found that the inmates had a

liberty interest in discretionary parole that was protected by the Due Process Clause. The right was created by the "expectancy of release provided in the [Nebraska parole statute.]" That statute provided that the parole board "shall order" release of eligible inmates unless that release would have certain negative impacts. (**Id.** at 11-12.) The supreme court returned to the issue in **Board of Pardons v Allen**, 482 U.S. 369 (1987). There it held that a similar liberty interest was created even though the parole board had great discretion. (**Id.** at 381.) For parole decisions, this mode of analysis survived the Supreme Court's later rejection of it for prison disciplinary decisions in **Sandin v conner**, 515 U.S. 472 (1995). **Biggs v Terhune**, 334 F.3d 910, 914 (9th Cir. 2003), (**Sandin** "does not affect the creation of liberty interests in parole under **Greenholtz** and **Allen**.").

While there is "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," **Greenholtz v Inmates of Nebraska Penal and Corr. Complex**, 442 U.S. 1, 7 (1979) a state's statutory parole scheme, if it uses mandatory language, may create a presumption that parole release will be granted when or, unless certain designated findings are made, and thereby give rise to a constitutionally protected liberty interest, **See Board of Pardons v Allen**, 482 U.S. 369, 376-378 (1987) (Montana parole statute providing that board "shall" release prisoner, subject to certain restrictions, creates due process liberty interest in release on parole). In such a case, a prisoner has liberty interest in parole that cannot be denied without adequate procedural due process protections. **See Allen**, 482 U.S. at 373-381; **Greenholtz**, 442 U.S. at 11-16.

Petitioner submits that California's parole scheme uses mandatory language and is similar to the scheme in **Allen** and **Greenholtz** which the United States Supreme Court held gave rise to a protected liberty interest in release on parole. In California, the panel or board "shall set a release date unless

it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code §3041(b). Under the clearly established framework of **Allen** and **Greenholtz**, "California's parole scheme gives rise to a cognizable liberty interest in release on parole." **McQuillion v Duncan**, 306 F.3d 895, 902 (9th Cir. 2002). The scheme requires that parole release be granted unless the statutorily defined determination (that considerations of public safety forbid it.) is made. (**Ibid.**; **Biggs v Terhune**, 334 F.3d 910, 915-916 (9th Cir. 2003) [Finding initial refusal to set parole date for prisoner with fifteen-to-life sentences implicated petitioner's liberty interest].) The United States Court of Appeals for the Ninth Circuit revisited this matter when the board asserted that the California Supreme Court interpreted state statue and code to be such that NO presumption or liberty interest in parole release was created for indeterminately sentenced prisoners. This argument was rejected. **See Sass v California Bd. of Prison Terms**, 461 F.3d 1127-1128 (2006).

D.

THE STANDARD OF REVIEW FOR DETERMINING WHETHER THE BOARD'S CONCLUSION THAT PETITIONER'S RELEASE TO PAROLE WOULD "UNREASONABLY" ENDANGER PUBLIC SAFETY IS THE UNITED STATES SUPREME COURT'S "SOME EVIDENCE" STANDARD, EXPLAINED IN **SUPERINTENDENT V Hill**, 472 U.S. 445, 454-455 (1985)

Petitioner contends that his due process rights were violated when he was denied parole for the 7th time because of the immutable circumstances of his criminal conviction.

The Supreme Court has clearly established that a parole board's decision deprives a prisoner of due process if the board's decision is not supported by "some evidence"in the record", or is "otherwise arbitrary." **Irons v Carey**, 479

F.3d 658, 662 (9th Cir. 2007) (applying "some evidence" standard used for disciplinary hearings as outlined in **Superintendent v Hill**, 472 U.S. 445, 454-455 (1985); **McQuillion v Duncan**, 306 F3d 895, 904 (same). The evidence underlying the board's decision must also have "some indicia of reliability" rationally related to the conclusion that petitioner's release would unreasonably endanger public safety. **McQuillion**, 306 F.3d at 904; **Biggs v Terhune**, 334 F.3d 910, 915. The some evidence standard identified in **Hill** is clearly established federal law in the parole context for purposes of 28 U.S.C. §2254 (d). **See Sass v. California Bd. of Prison Terms**, 461 F.3d 1127, 1128-1129 (9th Cir. 2006).

As explained, ascertaining whether the some evidence standard is met "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." **Hill**, 472 U.S. at 455 (Emphasis added); **Sass**, 461 F.3d at 1128. The some evidence standard is minimal, and assures that "the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." **Sass**, 461 F.3d at 1129 (quoting **Hill**, 472 U.S. at 457).

California courts have further explained that "the commitment offense can negate suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison. Yet, the predictive value of the commitment offense may be very questionable after a long period of time." **In re Scott**, 34 Cal.Rptr. 3d 905, 916, 920, fn. 9 (Cal. App. 1 Dist. (2005). In examining the evidence, "the test is not whether some evidence supports the reasons the [Board] cites for denying parole, but whether some evidence indicates a parolee's release unreasonably endangers public safety. (cites omitted)" **In re Lee**, 49 original).

Cal. Rptr. 3d 931, 936-940 (Cal. App. 2 Dist. 2006) (emphasis in original); **In re Elkins**, 50 Cal. Rptr. 3d 503, 515-518 (Cal. App. 1 Dist. 2006 (same).)

Recent Ninth Circuit cases reflect that a critical issue in parole denial cases is the Board's use of evidence from the commitment offense and prior history. In **Biggs**, the court explained that the some evidence standard may be considered in light of the Board's decisions over time. **Biggs**, 334 F.3d at 916-917. The court reasoned that "[t]he parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered... A continued reliance in the future on an unchanging factor, the circumstances of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." (**Id.**) Although the **Biggs** court upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, the court cautioned that "[o]ver time, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of his offense would raise serious questions involving his liberty interest." (**Id.** at 916).

The **Sass** court criticized the decisions in **Biggs**: "Under AEDPA it is not our function to speculate about how future parole hearings could proceed." **Sass**, 461 F.3d at 1129. **Sass** determined that it is not a due process violation per se if the Board determines parole suitability based solely on the unchanging factors of the commitment offense and prior offenses. (**See id.** [prisoner's commitment offenses in combination with prior offenses amounted to some evidence to support the Board's denial of parole].) However, **Sass** does not dispute the argument in **Biggs** that, overtime, a commitment offense may be less probative of a prisoner's **current** threat to the public safety.

In **Irons** the Ninth Circuit Court emphasized the continuing vitality of

Biggs, but concluded that relief for Irons was precluded by **Sass**. (**See Irons**, 470 F.3d at 664.) The Ninth Circuit Court explained that all of the cases in which it previously held that denying parole based solely on the commitment offense comported with due process were ones in which the prisoner had not yet served the minimum years required by the sentence. (**Id.** at 665). Also, noting that the parole board in **Sass** and **Irons** appeared to give little or no weight to evidence of the prisoner's rehabilitation. The Ninth Circuit Court stressed its hope that "the Board will come to recognize that in some cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from relevant California Statutes." (**Id.** [citing **Biggs**, 334 F.3d at 917].) California's parole statutes establish that "the commitment offense can negate [parole] suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison." **(In re Tripp** (2007) 150 Cal. App. 4th 306, 319.)

E.

THE CIRCUMSTANCES OF PETITIONER'S COMMITMENT OFFENSE WAS NOT, AT THE TIME OF THE HEARING, SOME EVIDENCE THAT HIS RELEASE TO PAROLE WOULD UNREASONABLY ENDANGER PUBLIC SAFETY.

Before the August 2, 2006 BPH panel was an extensive record of rehabilition accomplished by petitioner during the 16½ years since the commitment offense of Attempted Murder on February 28, 1990. This extensive record includes over 10 years of participation in AA and NA groups; at least 20 certificates for completions of other groups and programs; a completion in welding; a diploma in writing; and, more importantly, 16½ years of sobriety from drugs and alcohol. Petitioner has matured and has received many chronos from staff supervisors that he is an acceptable to exceptional employee. As mentioned, all reports prepared by prison staff regarding petitioner's suitability are favorable for

his release.

Petitioner has more than demonstrated that he is rehabilitated and worthy of parole. He has an excellent expectation for success on parole as he has excellent parole plans; job offers- is very much employable upon release; he has extensive support from family and friends; and is sincere in his addiction recovery.

Considering that petitioner's "reasonable [disciplinary] record" consists of 2 Division "F" offenses ("F" being the least serious of all "serious"), and 1 Administrative offense- none of which curtail violence or drug or alcohol use, and the fact that prison psychologists feel that his violence potential is "nil" to "no more than the average citizen", this should not have precluded him from consideration for parole and surely demonstrates that he does not pose an unreasonable threat to public safety. The panel was correct to conclude that petitioner's record is "reasonable".

Therefore, based on the record and reports before the panel and the state courts, petitioner has demonstrated that he has adequately bridged the gap between his behavior on February 28, 1990 and his current rediness for return to society. The lower courts should have ordered and evidentiary hearing so their record could reflect the above. Based on A through E above this court is presented these questions:

1.

WAS THE SUPERIOR COURT DECISION AND SUBSEQUENT APPELLATE AND SUPREME COURT SUMMARY DENIALS AN ABUSE OF DISCRETION UNDER CALIFORNIA STATE LAW?

2.

WAS THE LOWER JUDICIARY'S REFUSAL TO GRANT HABEAS CORPUS RELIEF "CONTRARY TO" CONTROLLING U.S. SUPREME COURT HOLDINGS, AS APPLICABLE VIA THE 14TH AMENDMENT'S "DUE PROCESS" CLAUSE, WHEN DENYING LIBERTY INTEREST IN PAROLE BY AFFIRMING THE PAROLE BOARD'S DECISION? (28 USC §2254(d)(1).

3.

WERE THE LOWER COURT'S REFUSALS TO GRANT HABEAS CORPUS RELIEF AN "UNREASONABLE APPLICATION" OF CONTROLLING U.S. SUPREME COURT CASES WHICH SHOULD HAVE CONTROLLED LOWER DECISIONS AS APPLICABLE VIA THE 14TH AMENDMENT'S "DUE PROCESS" CLAUSE WHEN DENYING LIBERTY INTEREST IN PAROLE?

4.

DID THE LOWER COURT'S REFUSAL TO GRANT HABEAS CORPUS RELIEF ESTABLISH THAT THE ORDERS BECAME AN "UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED" WHEN DENYING LIBERTY INTEREST IN PAROLE AS THE JUDICIALLY VAGUE EVIDENCE WAS CONTRADICTED BY "CLEAR AND CONVINCING EVIDENCE" TO SUPPORT PETITIONER'S ALLEGATIONS OF 14TH AMENDMENT DUE PROCESS VIOLATIONS?

The following claims have thus been presented to this and the lower courts:

CLAIM 1.
THE BOARD OF PAROLE HEARINGS' DECISION TO DENY PAROLE IS SUBJECT TO MEANINGFUL JUDICIAL REVIEW.

Sentencing under PC. §190 et Seq. after conviction of an attempted murder under PC. §664/187 makes petitioner subject to the Board of Parole Hearing's authority to grant parole. In the conducting of a parole hearing, the BPH is subject to PC. §3041. California's parole scheme creates a cognizable liberty interest in release on parole (**McQuillion**, 306 F.3d at pg. 901-902).

> "Section 3041 of the California Penal Code creates in every inmate a cognizable liberty interest in parole which is protected by the procedural safeguards of the due process clause [citations] ....the liberty interest is created, not upon the grant of the parole date, but upon the incarceration of the inmate."

Biggs, 334 F.3d at pg. 915, "Prisoners have a protected liberty interest in parole under the due process protection of the California constitution." (**Rosencrantz**, 128 Cal. Rptr. 2d 137-138).

"The governing statutes provide that the Board is the Administrative agency within the executive branch that generally is authorized to grant parole and fix release dates (PC. §§3040, 5075 et Seq." (**Rosencrantz**, 128 CAL. Rptr. 2d at pg. 137). "Habeas Corpus is the proper remedy to test the propriety of proceedings before the Board." Judicial Review may be obtained by filing a

Petition for Writ of Habeas Corpus. (**Powell**, 45 Cal. 3d pg. 900). The proper court in which to start an original petition is the sentencing Superior Court. (**Sena**, 115 Cal. Rptr. 2d at 25).

The evidentiary standard on judicial review of the Board's decision is "some evidence," but this must be applied in the context of the statutory framework in which petitioner's liberty interest arises. "[w]e conclude that the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of the due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole based upon the factors specified by statute and regulation." (**Rosencrantz**, 29 Cal. 4th at 658). The court made clear that the "some evidence" test is embedded in all other due process of law. "[A]s long as the (Board's) decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards. The court's review is limited to ascertaining whether there is some evidence in the record that supports the (Board's) decision." **Id. at 677**.

Evidence relied upon must posess "some indicia of reliability." (**Biggs**, 334 F.3d at 915; **McQuillion**, 306 F.3d at 904; **Jancsek**, 833 F.2d at 1390). The evidence is subject to both state and federal rules of evidence (See **Hill**, 472 U.S. at 455-457). Petitioner requests now and in every phase of lower proceedings, an evidentiary hearing regarding the attached exhibits, because "[A]t the evidentiary hearing, such exhibits are subject to admission into evidence in accordance with generally applicable rules of evidence." (**Rosencrantz**, 29 Cal. 4th at 675).

"[R]elease upon parole is the rule rather than the exception." (**Smith**, 114 Cal. App. 4th at 351). "[A] grant of parole is an integral part of the penol-

ogical system intended to help those convicted of a crime to integrate into society as constructive individuals as soon as possible and alleviate the cost of maintaining them in custodial facilities." (**People v Vickers**, (1972) 8 Cal. 3d 451); **Morrissey v Brewer**, (1972) 408 U.S. at 477).

CLAIM 2.

THE BOARD OF PAROLE HEARINGS VIOLATED PETITIONER'S FEDERALLY PROTECTED RIGHT TO DUE PROCESS, GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT FOUND PETITIONER UNSUITABLE FOR PAROLE FOR THE SEVENTH TIME, RELYING ON IMMUTABLE FACTORS AND REASONS THAT DO NOT PROVIDE "SOME EVIDENCE" TO SUPPORT THE "CONCLUSION" THAT PETITIONER "WOULD POSE AN UNREASONABLE RISK OF DANGER TO SOCIETY OR A THREAT TO PUBLIC SAFETY IF RELEASED FROM PRISON."

"The commitment offense can negate suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison... thus, denial of release solely on the basis of the gravity of the offense warrants especially close scrutiny... [t]he gravity of the commitment offense or offenses alone may be sufficient basis for denying a parole application, so long as the Board does not fail to consider all other relevant factors." (**Scott II**, 133 Cal. App. 4th 753; 2005 DJDAR at 12456).

The BPH's refusal to consider age and remorse deprives petitioner of due process of law because he "is entitled to 'an individualized consideration of all relevant factors.'" (citation) (**DeLuna**, 126 Cal. App. 4th at 591).

Age has long been regarded as a factor in parole decisions. (**Schoengarth**, 66 Cal. 2d at 300). Regarding CCR. 15 §2402(d)(7) Age, "the decrease in violence and criminal activity with age is a well established principle of criminology." (Erica Beecher-Monas & Edgar Garcia-Rill, Danger at the edge of Chaos: Predicting violent behavior in post-daubert world, 24 Cardoza L. Rev. 1845, 1898 (2003)). "[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as indiv-

iduals mature, the impetuousness and recklessness that may dominate in younger years can subside." (**Johnson**, 509 U.S. 368 (1993)). The evidence in petitioner's case fits and the failure of the BPH to reflect consideration of this factor highlights the BPH's arbitrary and capricious manner in denying parole.

Similarly, the record is replete with evidence that petitioner understands the magnitude and significance of his crime against Matt Mabry. Historically the BPH puts great weight on a prisoner's attitude toward the offense, and this was so even before the BPH was legally required to consider this factor. (**Seabock**, 140 Cal. App. 3d at 33). **Rosencrantz**, held the importance of culpability and remorse. (**Rosencrantz**, 29 Cal. 4th at 680). Given that Court's adminition that all statutory and regulatory factors be considered, the BPH's failure to apply these factors is a failure in due process.

CLAIM 3.

PETITIONER'S COMMITMENT OFFENSE WAS NOT A FIRST DEGREE MURDER; A FELONY MURDER; NOR AN EXECUTION STYLE MURDER, YET PETITIONER HAS SERVED THE MINIMUM TERM FOR SUCH OFFENSES.

PC. §3041(b) requires that the BPH consider the gravity of petitioner's offense in relation to its threat to public safety, but **Rosencrantz** requires that, in doing so, the BPH must apply appropriate legal principles. If petitioner will pose no threat or an unreasonable risk to public safety (PC. §3041(a)), he is entitled to be paroled. In fact, petitioner is well beyond the point at which he became entitled to have a parole date set. (**Dannenberg**, 34 Cal. 4th at 1078-1079).

In re Rosencrantz, the court entertained and weighed in regarding elements of first degree murder within a second degree murder offense. Could the BPH find a prisoner unsuitable if their second degree offense was carried out in a first degree murder manner? Could a second degree murder be subjected to first degree murder standards? The court appears to allow for such which would allow some second degree murder cases (those with first degree elements)

to be denied parole longer than others.

Even if petitioner's attempted murder of Matt Mabry were especially heinous by virtue of causing death, when petitioner is past the minimum time served for first degree murder, it is appropriate by due process to consider the gravity of the offense under first degree murder standards. It is true the BPH may deny a grant of parole due to the nature of the commitment offense alone (**Dannenberg**, 34 Cal. 4th at 1094; **Rosencrantz**, 29 Cal. 4th at 682), but it is in the nature of the statute to differentiate kinds of murder, the difference between murder and attempted murder, and the BPH must apply all appropriate legal principles to all the statutory and regulatory factors when it does so.

The principle of reviewing the circumstances of a second degree murder as if it were, and in the light of, first degree murder, was suggested in **Ramirez**, 94 cal. App. 4th, 570-571. It is legal principle established by the legislature that there be "distinct terms to life without the possibility of parole, 25 years to life, 15 years to life and life with the possibility of parole in 7 years and these are to be applied to different degrees and kinds of murder. (PC §190 et Seq.) (emphasis added, op. cit.) The principle of review was later explained and approved without dissent in **Rosencrantz**, 29 Cal. 4th at 690, J. Moreno concurring. The practice was approved, applied, and distinguished from the facts in **Ramirez**, by **Van houten**, 10 Cal. Rptr. 3d at 424-425. Application to petitioner's offense shows there is no element so egregious to make the offense especially heinous as a first degree murder. And petitioner's offense is not felony murder, as was **Ramirez** and **Van Houten**, and it cannot be said that, for a first degree murder, the attempted murder was more than minimally necessary to convict of attempted willful, deliberate and premeditated murder as defined in CCR 15 §2403(d). Petitioner is, therefore, suitable for parole because, by those standards, his crime is not so grave as all

other first degree murders. Petitioner is entitled to have his liberty interest in parole decided according to the most appropriate legal principles, including the evaluation of the gravity of his offense by first degree murder standards.

The offense is the BPH's sole ground for denying parole. However, the decision reflects no consideration of the statutory mandate that there be some consideration given between the length of the sentence and the seriousness of the offense. "There will come a point, which may already have arrived, when petitioner would have become eligible for parole if he had been convicted of first degree murder. Once petitioner reaches that point, it is appropriate to consider whether his offense would still be considered especially egregious for a first degree murder in order to promote the parole statute [standard] goal of proportionality between length of sentence and the seriousmess of the offense (citation)." **(Rosencrantz**, 29 Cal. 4th at 690, J. Moreno concurring). This discussion was regarding degrees of murder.

What about holding a prisoner to a crime and its proportionality that he didn't commit but attempted to commit? How would the above discussion factor in the crime of attempted murder? It cannot be said that petitioner's application for parole has been decided after applying all appropriate legal principles in the context of statute and regulation. The BPH's decision is, therefore, arbitrary in the sense that the gravity of petitioner's offense has not been decided under the due process requirement and, therefore, his current risk to public safety has been decided in an arbitrary and capricious manner.

United States v Caceres( ) 59 L. Ed 2d 733, fn. 14, in part, 440 U.S. 741, 995 Ct. 1465 has held:

> "Where the rights of individuals are affected it is incumbent upon agencies to follow their own procedures. This is so even where internal procedures are possibly more rigorous than otherwise would be required. **Morton v Ruiz** 415 U.S. 199, 235, 39 L. Ed 2d, 270, 94 S.Ct. 1055."

In this particular claim, petitioner has been denied parole by the BPH's

use of his commitment offense of attempted murder. However, petitioner sets forth how this use was arbitrary to the point of illegally keeping him imprisoned in violation of his 14th Amendment due process protections.

(RIGHT TO PROCEDURAL DUE PROCESS)

A "liberty interest" to some right/expectation/benefit before the 14th Amendment's due process clause is triggered in situations where there is a denial of parole. **In re Johnson**, (Cal. App. 1 District 1995) 41 Cal. Rptr. 2d 449, 456: "Altough the Board has broad discretion in parole matters, that discretion is subject to the prisoner's right to procedural due process."

Solidifying the need of specific procedures in which to deny parole, **In re Dannenberg**, (Cal. Sup. Ct. 2005) 34 Cal. 4th 1061, 23 Cal. Rptr. 3d 417 has stated:

> "[Penal Code] section 3041 addresses how the Board is to make decisions for indeterminate life inmates.... In response to these requirements, the Board has adopted regulations covering the various categories of indeterminate life inmates.... The regulations do set detailed standards and criteria for determining whether a murderer is suitable for parole." (emphasis added)

CLAIM 4.

PETITIONER CONTENDS THERE IS NO EVIDENCE IN THE RECORD TO PERMIT HIS "SERIOUS" RULES VIOLATION REPORTS (CDC-115's) TO BE "SOME EVIDENCE" WITHIN THE MEANING OF **SUPERINTENDENT V HILL** AS AN INDICIA OF RELIABILITY TO PREDICT FUTURE DANGEROUSNESS OR TO BE AN UNREASONABLE RISK UNDER CCR 15, §2402 (a).

Jancsek v Oregon Bd. of Parole, (9th Cir. 1987) 833 F. 2d 1389, 1390 has signified: "[t]he evidence underlying the [Parole] board's decision must have some indicia of reliability." Here, petitioner further proffers the analysis of "serious" rules violation reports with past criminality that was minor in nature. Petitioner cannot say these two distinct aspects are synonymous; however, they should be parallel under the following case's analogy:

> **In re DeLuna**, (2005) 126 Cal. App. 4th 585, 598 (inmate's previous arrest record did not constitute "some evidence" of a threat to public safety because the alleged acts did not involve serious injury or attempted serious injury to a victim).

Here, the BPH's use of basically minor CDC-115's where no injury or violence was involved to deny parole as they would like to see more distance between them (HT:2006, pg. 79, lns. 2-7) and as a means of oppression violates petitioner's 14th Amendment due process protections.

CLAIM 5.

THERE IS NO NEXUS BETWEEN THE COMMITMENT OFFENSE, "A REASONABLE [DISCIPLINARY] RECORD," AND PETITIONER'S CURRENT PAROLE RISK.

The BPH's 2006 denial represents the fifth time they have used the commitment offense to deny parole. In making its decision the BPH made a connection between the unchanging circumstances of petitioner's offense and his current risk to public safety. As explained in **Rosencrantz**, 29 Cal. 4th at 656, the "some evidence" test means that the connection must have some rational basis in fact. "[I]n the parole context, the requirements of due process are met if some evidence supports the decision," and "the evidence underlying the decision must possess some indicia of reliability." **Biggs**, 334 F.3d at 914-915. Evidence that lacks any probative value cannot constitute "some evidence." **(Cato**, 924 F.2d at 705). Flipping a coin, baseless speculation, caprice, whim, stereotyping, or the use of the slightest speck of evidence do not satisfy the test.

It is the BPH's duty under PC. §3041(b) to predict by subjective analysis petitioner's current danger to public safety. **Rosencrantz**, 29 Cal. 4th at 655. Given petitioner's sole act of violence and his current state of rehabilitation, which not even the BPH disputes, after nearly 17 years in prison, the BPH's ability to predict petitioner's future dangerousness based solely on the circumstances of the offense is nil. For this reason the BPH and CDCR order psychological and Board reports. They are suppose to utilize these as a means of predicting petitioner's future dangerousness. Instead of doing that, the BPH tries to link non-serious behavior and trivial speculation in order to

find unsuitability. In this way the BPH can avoid recognizing expert analysis regarding this prediction. If petitioner's psychologist and counselor reports were negative and reported that petitioner posed a high degree of threat, instead of nil, one would suppose the BPH would have talked endlessly about them. But, as it was, they merely mentioned that these reports were "basically good, basically supports your parole." (HT:2006, pg. 77, lns. 24-26; pg. 78, lns. 1-3).

There was no mention by the BPH what these reports stated about petitioner's disciplinary record. "To a point, it is true, the circumstances of the crime and the motivation for it may indicate a prisoner's instability, cruelty, impulsiveness, violent tendencies, and the like. However, after 16 or so years in the caldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite the recognized hardships of prison, this petitioner does not possess those attributes, the predictive ability of the circumstances of the crime is near zero." **(Irons**, 358 F.Supp. 2d at 947, emphasis added).

"The commitment offense can negate suitibility only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison. Yet, the predictive value of the commitment offense may be very questionable after a long period of time." **(Scott II**, 133 Cal. App. 4th at 595).

> "Although the gravity of the commitment offense and other pre-conviction factors alone may be sufficient to justify the denial of a parole date at a prisoner's initial hearing, subsequent BPT decisions to deny a parole must be supported by some post-conviction evidence that the release of an inmate is against the interest of the public safety." **(Masoner**, (2004) WL 1080177 at #1-2 (C.D. Cal. 2004)).

The BPH has only one fundamental decision to make: is petitioner a current threat to public safety? "[A] determination of unsuitibility is simple shorthand for a finding that a prisoner currently would pose an unreasonable risk

of danger if released at this time." **(Smith**, 114 Cal. App. 4th at 370; CCR 15 §2402(d)) Citing the way petitioner carried out his crime establishes that petitioner was, at one time, in the past, a threat to public safety. However, given the petitioner's current will, established remorse, and rehabilitation, the BPH is required to find grounds that exist now that petitioner somehow poses a "continuing danger to the public." **(Dannenberg**, 34 Cal. 4th at 1084).

The real, complete, facts surrounding the offense and petitioner's subsequent post-conviction rehabilitation do not NOW constitute "some evidence", possessing "some indicia of reliability" that petitioner poses a danger to the public. The BPH's decision is a violation of due process because it is arbitrary and capricious. **(Hill**, 472 U.S. at 455; **Biggs**, 334 F.3d at 917; **Irons**, 359 F.Supp.2d at 947).

CONCLUSION.

No one disputes the cruelty, callousness, or the motive in the attempted murder and injury to Matt Mabry, nor does the BPH dispute that petitioner's rehabilitation is real and evident. The BPH cited no other evidence or circumstance to deny parole. "Continuing reliance on unchanging circumstances transforms an offense for which California Law provides eligibility for parole into a de facto life imprisonment without parole... given that no one seriously contends lack of [callousness, cruelty, or motive] at the present time, the potential for parole in this case is remote to the point of non-existant. Petitioner's liberty interest should not be determined by such an arbitrary, remote possibility." **(Irons**, 358 F.Supp.2d at 947).

If each panel of the BPH is allowed to determine that all gains made by petitioner are recent, or just now happening, then, year by year, petitioner will be held unsuitable regardless of his current state of rehabilitation. Such a state of affairs is arbitrary in the sense that petitioner's suitability would depend upon the personality of the decision maker, rather than statute

and regulation, as required.

Petitioner admits guilt for this crime and has since his arrest. Petitioner has spent his time in prison well and has participated in 40 plus programs to get a perspective on how to reenter society as a productive citizen.

The state courts should have ordered an evidentiary hearing if they needed clarification on the exhibits attached hereto. Lack of an evidentiary hearing further deprives petitioner a chance to shed light on his many acheivements since the day he commited this terrible crime. Petitioner is rehabilitated.

PRAYER FOR RELIEF.

Wherefore, based on the 5 claims and 4 questions of law and the accompanying memorandum of points and authorities detailed and attached to this petition for writ of habeas corpus, petitioner prays this court:

!.) Issue an order to show cause;

2.) Order an evidentiary hearing;

3.) appoint counsel to represent petitioner;

4.) or, in the alternative, rule on the merits of the case, and or, let the court conduct a fair and impartial hearing;

5.) any other relief, either declaratory, injunctive, or both, as the court may deem necessary, reasonable, just, and fair.

Dated: OCT. 25, 2007

Respectfully Submitted,

Jody D. Patterson,
petitioner, in pro se.

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

SEE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES.

Do you have an attorney for this petition? Yes____ No XX

If you do, give the name and address of your attorney:

APPOINTMENT OF COUNSEL REEQUESTED.

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on OCT. 25, 2007
Date

Jody D. Patterson, In Pro Per
Signature of Petitioner

(Rev. 6/02)